

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

NATIONAL RIFLE ASSOCIATION OF AMERICA, *

Plaintiff, *

-v- 18-cv-566 *

ANDREW CUOMO, MARIA T. VULLO, et al., *

Defendants. *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHRISTIAN F. HUMMEL
December 4, 2019
445 Broadway, Albany, New York

FOR THE GOVERNMENT:

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1 COURT CLERK: The case is National Rifle
2 Association versus Cuomo, docket number 18-cv-566.

3 Appearances for the record, please.

4 MR. CANONI: Good afternoon, your Honor. My
5 name is John Canoni for the firm Brewer, Attorneys &
6 Counselors. With me today, but not appearing for the
7 record because she's not yet admitted to this court, is
8 Brittany Siscoe from our office.

9 THE COURT: Good afternoon, Counsel. Good
10 afternoon, Ms. Siscoe.

11 MR. SCOTT: William Scott, New York State
12 Office of the Attorney General, for Defendants DFS and
13 Cuomo.

14 MS. GREENBERGER: Debra Greenberger from
15 Emery, Celli, Brinckerhoff & Abady for the Defendant
16 Maria Vullo. Good afternoon, your Honor.

17 THE COURT: Good afternoon, Ms. Greenberger.
18 Good afternoon, Mr. Scott.

19 I scheduled this conference because I received
20 a series of letters from counsel regarding proposal by
21 the plaintiff, National Rifle Association of America,
22 seeking leave of the Court to serve an amended complaint
23 in this matter.

24 Docket No. 145 is a letter from the Brewer
25 firm, signed by Mr. Canoni, dated November 25th of 2019

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1 laying out, at the Court's direction, what has
2 transpired since Judge McAvoy's decision on the motion
3 to dismiss, which was entered on May 9th of 2019.

4 Docket No. 146 is a letter from Mr. Scott on
5 behalf of Governor Cuomo setting forth his opposition to
6 the request from the NRA that they be granted leave to
7 serve an amended complaint in this matter, and Docket
8 No. 147 is a letter from Mr. Celli and Mr. Greenberger,
9 on behalf of their client, Maria Vullo, indicating their
10 position with request to Mr. Canoni's earlier letter
11 seeking leave to serve an amended complaint in this
12 matter.

13 I'd just note the following: That the initial
14 deadline to file any application to amend pleadings as
15 set forth in Docket No. 66, which was the Uniform
16 Pretrial Scheduling Order, January 31st of 2019.

17 Mr. Canoni, in his letter of November 25th,
18 2019, correctly points out that it would have been
19 difficult to make this motion directed to repleading
20 their selective enforcement claim as Judge McAvoy's
21 decision was not issued until May 9th of 2019.

22 So the extent that that period of time is a
23 consideration, the Court agrees with plaintiff's counsel
24 that, as a practical matter, it's difficult to make a
25 motion to amend until you receive Judge McAvoy's

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1 decision on May 9th of 2019.

2 I guess, Mr. Canoni, let me ask you a
3 question. What has transpired between May 9th of 2019
4 and the date that you sent your letter to the Court
5 seeking leave to amend your pleadings that brings us
6 here today?

7 MR. CANONI: Thank you, your Honor.

8 And I would just note, I'd like a little
9 latitude to expand a little bit. We didn't have a lot
10 of time to put the letter together or I'm happy to
11 answer any questions Your Honor might have.

12 I also just want to make clear, and I don't
13 want to get caught up on semantics, we are not seeking
14 leave to serve our amended complaint. We haven't filed
15 our motions to amend yet.

16 THE COURT: Seeking leave to make a motion.

17 MR. CANONI: Yes, I wanted that -- I wanted
18 everybody to be clear about that, and I knew Your Honor
19 knew, and I'll be very clear today on what we want to do
20 when we file our motion to amend.

21 We are not -- Mr. Scott will be happy, at
22 least temporarily. We are not, as part of this
23 amendment, seeking to replead this selective enforcement
24 claim as to Governor Cuomo. We are only seeking to
25 replead the selective enforcement claim as to Ms. Vullo.

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1 The basis for that, your Honor, is that we now have a
2 basis to plausibly allege specific facts that Ms. Vullo
3 was aware of the comparators in February and March of
4 2018, which is critical because it is prior to the
5 April 2018 guidance letters, prior to the consent orders
6 that are at issue in this case and, therefore, we
7 believe addresses the deficiencies that were addressed
8 in Judge McAvoy's May 9th decision.

9 Now, there's been some talk in the letters
10 regarding documents that the NRA obtained from Lloyd's
11 in the summer of 2019. However, I do agree with
12 Ms. Greenberger's letter in one respect, which is the
13 documents from Lloyd's, on their face, don't tell the
14 whole story. You needed to get interpretative evidence
15 from those letters as to conversations that Ms. Vullo
16 had with Lloyd's and others about the comparators and
17 her knowledge thereof.

18 We tried to get that information from Lloyd's,
19 we were not able to do so, and it's only in the last
20 month or so, through our own investigative efforts from
21 non-parties, that we were able to obtain the information
22 that will be in our proposed second amended complaint as
23 it specifically relates to Ms. Vullo.

24 THE COURT: Who did you get that information
25 from, Mr. Canoni, and when?

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1 MR. CANONI: We got it from a consulting
2 individual. I'd rather not disclose their name now but
3 it's somebody that was knowledgeable of the
4 conversations between DFS, Ms. Vullo and Lloyd's.

5 THE COURT: Okay. Go ahead, Mr. Canoni.

6 MR. CANONI: And so, your Honor, that's -- I
7 think should be the open-and-shut part of the delay
8 issue.

9 There's case law replete. We cited a little
10 bit of it in our letter brief. You know, delay of a
11 month or two is certainly not grounds for delay. I will
12 confess to the Court that we were trying to follow up
13 through this source and others to see if there was any
14 evidence that linked Governor Cuomo to the same
15 conversations, and we recognize that we didn't want to
16 sit on this evidence. When we were not able to do that,
17 we made the decision to ask the Court for leave to
18 amend.

19 I want everybody to be clear that, if in
20 discovery in this case we obtain evidence that indicates
21 Governor Cuomo similarly had knowledge, we will be
22 coming back to the Court when we obtain that information
23 and seek to replead again.

24 I'll address a couple other issues and then
25 I'll be happy to answer your questions. There's been

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1 some discussion about the fact that we did not submit
2 the proposed amended pleading. I'm sure Your Honor is
3 familiar with the local rule. We do that when we file
4 our motion. We are happy to do that.

5 There was some evidence -- indication that
6 the NRA was not clear that it sought to replead.
7 Mr. Scott's letter made reference to a couple of docket
8 entries, ECF 117 and ECF 130. I would note in ECF 117,
9 which was dated July 30th at pages 6, 7, that the NRA
10 said we are talking about, quote, claims that were
11 dismissed by the Court that the NRA seeks to replead in
12 the future.

13 THE COURT: Right.

14 MR. CANONI: And in Docket 130-1, dated
15 August 23rd at page 6, it discusses the equal protection
16 claims dismissed by the Court without prejudice and
17 expressly states, quote, the NRA intends to replead such
18 claims. Also in ECF 119, which was the letter to Your
19 Honor regarding the motion for evidence to be conducted
20 under the Hague Convention, the letter expressly states
21 that the information sought, quote, is also necessary to
22 support the NRA's selective enforcement claim that the
23 NRA intends to replead.

24 Just moving along and then I'll be finished
25 shortly.

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1 Once you get past the diligence part, the
2 Court needs to look at the prejudice with respect to the
3 defendants and, in fact, we cite one case, there are
4 many that we're happy to bring to the Court's attention
5 in our pleading, if the Court desires. Even if the
6 Court found for some reason that we had this information
7 months ago, sat on it, and didn't act until now, you
8 could still grant leave to amend or leave to file the
9 motion to amend if there was no prejudice.

10 THE COURT: I guess, Mr. Canoni, one of my
11 concerns is this case appears to me to be going nowhere.
12 I mean, there are at present -- I lost track -- at least
13 four motions which are pending.

14 When the Court decided the motion with respect
15 to Ms. Vullo, there's now a motion to re-argue pending.
16 When the Court decided the motion with respect to your
17 motion to compel, you filed an appeal to Judge McAvoy,
18 and now I have a special court-appointed master or
19 referee looking at north of 15,000 documents.

20 My concern is we're making no progress moving
21 this matter forward and my concern is, if you file yet
22 another motion to amend, that will delay the matter even
23 further.

24 What suggestion do you have to move this
25 matter forward towards a resolution?

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1 MR. CANONI: Your Honor, as the plaintiff, I
2 would be remiss if I didn't say we would like to start
3 conducting discovery. I understand there are these
4 motions pending and I'm not accusing anybody of acting
5 not diligently in doing that.

6 I will say for this claim specifically, Your
7 Honor noted the appeal we had. We said quite clearly
8 that the evidence that we're looking for that is
9 critical to the extent First Amendment retaliation
10 claims is the same evidence that could support the
11 selective enforcement claim.

12 So there will be no retreading of discovery.
13 You know, I would say as well, these claims have been
14 known to the defendants for quite some time.

15 I wish I had a better way to go about this.
16 This is exasperating for me, coming into this case
17 midstream, seeing the lack of significant progress, and
18 I share Your Honor's frustration. We really just want
19 to get the documents and start going.

20 THE COURT: My concern is the case is -- I'm
21 not blaming you or anybody in particular but as a
22 practical matter, the case is 19 months old and, you
23 know, if you read the Civil Case Management Plan, it
24 says cases should be trial ready in 18 months.

25 In any event, this case should be tried in --

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1 in three years at the outside. At present, it's simply
2 not going to happen because I don't know when Judge
3 McAvoy's going to decide your appeal. I don't know when
4 the special master is going to be done going through the
5 15,000-plus documents, and once Mr. Hill completes that,
6 I then need to do a report and recommendation for some
7 sort of order which would reflect with respect to what
8 he does, and then I assume one or both of you or all
9 three of you will appeal to Judge McAvoy, which will
10 delay the matter further.

11 MR. CANONI: I understood. I do have a
12 suggestion with respect to the special master. I
13 apologize --

14 THE COURT: What would that be?

15 MR. CANONI: -- stepping in. In other cases
16 where a special master has been looking at volumes of
17 documents in the tens of thousands, the counsel for the
18 parties have had successive meetings with a special
19 master to argue discreet items before the special master
20 that would eliminate, perhaps, some of these subsequent
21 appeals.

22 THE COURT: I'm happy --

23 MR. CANONI: I'm happy to write a letter to
24 the special master copying Your Honor laying that out.

25 THE COURT: I guess, you know, when the time

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1 comes for Mr. Scott and Ms. Greenberger to speak, I'll
2 ask them their view of that, but I want to talk to the
3 special master first and have some sense of where he is
4 and how he wishes to proceed.

5 What else do you want to tell me, Mr. Canoni,
6 if anything?

7 MR. CANONI: Just running through the rest of
8 our piece here, with respect to the prejudice, which is
9 where we left off, I would submit that the defendants
10 cannot demonstrate any prejudice and certainly not undue
11 prejudice, which is the standard.

12 THE COURT: Right.

13 MR. CANONI: Under the law in this Circuit,
14 they have the burden to demonstrate the prejudice and
15 merely claiming prejudice is not enough.

16 Ms. Vullo, with respect to these repled
17 claims, will not have to expend significant additional
18 resources because it's the same discovery that we're
19 going to be seeking with respect to the First Amendment
20 retaliation claims against her.

21 Lastly, I would just note that in this
22 Circuit, there's a strong policy of having disputes
23 decided on the merit. I'm sure Your Honor knows that.
24 I'm also prepared, given Your Honor's exhortations
25 during the last conference call, that we try to work

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1 more together.

2 I have a proposed briefing schedule that does
3 not try to hamstring Ms. Vullo's counsel during the
4 holidays, give her four weeks to respond and I will
5 point out to Your Honor that we do need to file a motion
6 to file exhibits under seal.

7 THE COURT: Right.

8 MR. CANONI: Unfortunately, another
9 exasperating point here is all of the documents are
10 marked confidential and, therefore, if we want to attach
11 exhibits to the proposed second amended complaint, those
12 exhibits will need to be filed under seal but we can do
13 that at the same time we file the motion to amend.

14 I'm happy to do this later but I would just
15 suggest sometime next week, maybe Friday the 13th, just
16 because that seems like a perfect day for this case, our
17 deadline to submit our papers, it would give Ms. Vullo's
18 counsel four weeks until January 10th, obviously these
19 can be extended, but just to demonstrate good faith that
20 we're not trying to push people to work over the
21 holidays, and then ten days later, unfortunately, is a
22 federal holiday, Martin Luther King, so the 21st of
23 January would be our proposed reply date.

24 Unless Your Honor has any other questions --

25 THE COURT: I don't at this time, Mr. Canoni.

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1 Thank you.

2 Mr. Scott, I guess I'll go to you next. It
3 appears, based on Mr. Canoni's recommendations, that
4 this proposed amendment does not affect your clients.

5 MR. SCOTT: That seems to be, your Honor. If
6 this isn't going to be an amendment as to DFS or
7 Governor Cuomo, I don't have much to add beyond what
8 we've already submitted to the Court.

9 The only thing I would note is, I assume if
10 there are going to be further discovery demands after
11 the complaint, that some portion that is going to be
12 directed to DFS, given that -- I'm assuming that the
13 activities allegedly occurred during Ms. Vullo's tenure
14 at DFS. So to the extent that those new demands somehow
15 impact to the currently pending motions, again, without
16 seeing the complaint, without seeing the demands, it's
17 tough to say how that's going to impact things but that
18 would be my only point of concern on that issue.

19 THE COURT: All right. Ms. Greenberger, good
20 afternoon.

21 MS. GREENBERGER: Good afternoon, your Honor.
22 It's interesting to me to hear yet a third basis for --
23 for an amendment, given that Your Honor had a conference
24 with us, asked for written documents, and in those
25 written documents -- and I'm referring to the November

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1 25th submission -- Mr. Canoni spoke to two potential
2 sources of a basis to plead claims against Ms. Vullo.
3 One was documents he got from Lloyd's in June and the
4 other is recent information concerning supposedly DFS
5 activity against AGIA and then when we said neither of
6 those are a basis to replead at this late stage, now I'm
7 hearing for the very first time that supposedly there
8 was some consulting individual that Mr. Canoni learned
9 about within the last month, which is very confusing why
10 that would not be in the submission that Your Honor
11 specifically directed to answer this question.

12 THE COURT: Let me know if you can answer,
13 Mr. Canoni, that question. Mr. Canoni, why is there no
14 reference to this consultant in your letter of
15 November 25th of 2019?

16 MR. CANONI: Well, your Honor, out of
17 courtesy, we needed to reach out to that person and
18 we're not able to reach that person in between the time
19 of the morning teleconference and the time the letter
20 was submitted.

21 We did say in the letter to Your Honor that we
22 sought the deposition of a representative of Lloyd's
23 America to interpret the Lloyd's documents.

24 THE COURT: Right.

25 MR. CANONI: We couldn't just amend on the

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1 basis of the documents themselves.

2 THE COURT: Okay?

3 MR. CANONI: So that is the explanation for
4 that.

5 THE COURT: Go ahead, Ms. Greenberger.

6 MS. GREENBERGER: While I recognize that
7 Mr. Canoni would prefer not to reveal this person's
8 information, I actually think where we are now, which is
9 that there has been months and months of delay, it's his
10 burden to show that he acted with reasonable diligence,
11 and I don't think he can meet that burden unless he
12 demonstrates who this supposed source is and when he
13 first had communications with this source so that we
14 have a basis to analyze whether he acted with diligence
15 when he learned this information.

16 THE COURT: What else, if anything, do you
17 want to tell me, Ms. Greenberger?

18 MS. GREENBERGER: I just want to add one last
19 thing, which is this idea that it's not the same
20 discovery. Your Honor has already ruled on this. In
21 your August decision you said certain discovery is not
22 relevant because there's no selective enforcement claim
23 and so if they are permitted to replead these claims, we
24 are then going to be back at least six months behind.

25 THE COURT: That's part of my concern. Do you

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1 have some suggestion, Ms. Greenberger, other than
2 denying his application to move this matter forward in a
3 more expeditious and orderly fashion?

4 MS. GREENBERGER: I think that there should
5 be -- you know, I think we should have been here today
6 with him giving the real allegations so we can have a
7 productive conversation as to whether there's something
8 here. I mean, just as a reminder, it's not just that he
9 needs to plead knowledge of the violations. He needs to
10 be able to plead, and I'm quoting from Judge McAvoy's --

11 THE COURT: May 9th decision.

12 MS. GREENBERGER: May 10th decision that
13 Ms. Vullo consciously declined to enforce the insurance
14 laws against the comparators. He needs to have
15 plausible, specific allegations. I haven't heard
16 anything today about that at all.

17 THE COURT: Mr. Canoni, would you like the
18 last word?

19 MR. CANONI: Your Honor, I just --

20 THE COURT: Mr. Canoni, I really just asked to
21 be polite.

22 MR. CANONI: Sorry?

23 THE COURT: I'm just asking but go ahead.

24 MR. CANONI: Unless Your Honor needs anything
25 further, I think it's set forth in what we have

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1 discussed already in our letters.

2 THE COURT: That was very good, Mr. Canoni.

3 Thank you.

4 MR. CANONI: I'm pretty smart for a dumb guy.

5 THE COURT: You came all the way from Dallas,
6 Mr. Canoni. I'm going to grant your application to make
7 the motion seeking leave to serve an amended complaint.

8 What is your briefing schedule, Mr. Canoni,
9 that you propose?

10 MR. CANONI: I had proposed December 13th for
11 the moving papers, January 10th for opposition, and
12 January 21st for reply.

13 THE COURT: Let me ask you as a practical
14 matter. Does that give your firm enough time to prepare
15 your motion? I assume Ms. Sisco is going to do it.
16 Unless the practice of law has changed since I was an
17 associate, I assume she's going to do it, not you. Is
18 that sufficient time? Would you like an additional
19 week?

20 MR. CANONI: We believe so but I will always
21 take Your Honor's suggestion for these things.

22 THE COURT: So if I give you an additional
23 week, what is the date you are looking at?

24 MR. CANONI: That would be 12/20 and
25 January 17th, and then we don't need an extra day for

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1 the federal holiday on the Monday. So that would be
2 1/27.

3 THE COURT: Ms. Greenberger, does that give
4 you sufficient time to respond, given the holidays?

5 MS. GREENBERGER: I expect so. Obviously I --
6 once I get back to my office, if there's any concern
7 with my client or with my colleagues, I will let you
8 know but I expect that should be fine.

9 THE COURT: I will entertain any reasonable
10 requests for an extension.

11 MR. CANONI: Your Honor, I don't think you
12 need to but if there's a reasonable extension, we will
13 stipulate to it.

14 THE COURT: Okay.

15 MR. CANONI: I know Your Honor has been asking
16 us to get along.

17 THE COURT: Mr. Scott?

18 MR. SCOTT: Again, I don't have the papers in
19 front of me. Assuming Mr. Canoni's represented, we --
20 it should be fine.

21 THE COURT: Okay. So let me just tell you
22 what I'm going to do from my perspective. I'm going to
23 take a much more hands-on approach. Again, I'm very
24 concerned with the fact this case appears to me to be
25 going nowhere. So my law clerk and I are going to take

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1 some of these motions out of order.

2 Traditionally, we decide motion in the order
3 on which they're filed. So we are going to make a plan
4 and take some of these motions out of order. The first
5 motion that we're going to address is, Ms. Greenberger,
6 is your motion to re-argue with respect to Ms. Vullo.
7 We may or may not want to conduct oral argument on that
8 motion.

9 It was my intention to have that conversation
10 with my career law clerk today but, unfortunately, she's
11 home with a migraine and so I could not discuss it with
12 her. So once I do that, I will let you know whether or
13 not we are going to do oral argument but I anticipate
14 that will be the next motion that we address.

15 Once that is done, we will probably do another
16 couple motions and we will take another one of these
17 motions until we work our way through them. I don't
18 know what Judge McAvoy's schedule is with respect to the
19 things that's on appeal; that's up to Judge McAvoy to
20 determine.

21 So, other than telling you to have a nice
22 holiday, Mr. Canoni and Mr. Scott, anything we can do
23 for you this morning?

24 MR. CANONI: Your Honor, just to resurrect the
25 idea of trying to expedite and perhaps try appeals from

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1 the special master --

2 THE COURT: Why don't you send me a letter
3 setting forth your position, and Mr. Scott and
4 Ms. Greenberger, you can file responses and then once I
5 get your responses, I will sit down with Mr. Hill and
6 review that idea with him and get some sense if he
7 thinks it's helpful or not helpful to him. I will also
8 get some sense of where of where he is and once I do
9 that, at our next conference I will give you some
10 indication where he stands with respect to reviewing
11 these document.

12 I spoke to him last a couple of weeks ago and
13 he asked me to give him a couple weeks to get started.
14 So I haven't spoken to him.

15 You folks are all set. Have a nice holiday.

16 MR. CANONI: Thank you.

17 MS. GREENBERGER: Thank you.

18 (Proceeding concluded)

19 * * * * *

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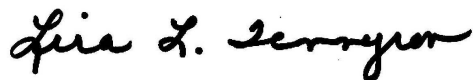
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C E R T I F I C A T I O N

I, Lisa L. Tennyson, RMR, CSR, CRR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.



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